Supreme Court, U.S.
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No. 01-0321

In The

Supreme Court of the United States

THOMAS E. TILLEY,

Petitioner,

vs.

TOWN OF ABERDEEN; J. ARTHUR PARKER; TONY ROBERTSON; GILES HOPKINS; DON WALKER; THE BROUGH LAW FIRM; WILLIAM C. MORGAN, JR.; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS; BILL MARTS; SAMUEL W. FIELDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Contrary to Petitioner's assertions, the Fourth Circuit Court of Appeal's unpublished *per curiam* decision is correct and does not conflict with any holding of this Court or any federal circuit court. In an effort to convince this Court to review the lower court's opinion, the Petitioner argues that the decision below conflicts with *Palazzolo v. Rhode Island*, ___ U.S. ___, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). However, *Palazzolo* is not on point and, therefore, does not dictate the outcome in the case at hand. Thus, the Fourth Circuit was correct in finding that the Petitioner did not meet this Court's prudential ripeness test set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT

The United States Court of Appeals for the Fourth Circuit was correct in finding that the Petitioner's case was not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). In *Williamson*, this Court developed a two-part test which requires that a "taking" claim will not be considered ripe for judicial review unless the claimants (1) have requested from the applicable agency a final decision regarding the application of the challenged regulations to the property, and (2) have similarly sought monetary compensation through the procedures provided by the state. *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3115. State regulatory agencies must have the "opportunity to grant any variances or waivers allowed by law," and "until these ordinary processes have been followed, the

extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo*, 121 S. Ct. at 2459 (citing *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3115).

Williamson involved a takings claim made by a developer whose proposed subdivision was first tentatively approved, then ultimately rejected as contrary to zoning regulations, by a local planning commission. The developer filed suit under 42 U.S.C. Section 1983, but the Supreme Court dismissed the case as not ripe, because the developer had neither applied for a variance nor sought to obtain compensation for the supposed taking through inverse condemnation proceedings. *See Williamson*, 473 U.S. at 186-97, 105 S. Ct. at 3116-22. Similarly, in the case at hand, because the Petitioner seeks to challenge a local land-use decision, *Williamson* applies. Like in *Williamson*, the Petitioner failed to seek a variance or to make use of North Carolina's inverse condemnation statute. Accordingly, since the Petitioner did not meet this Court's two-part test, the Fourth Circuit Court of Appeals was correct in finding that Petitioner's case was not ripe for judicial review.

Petitioner incorrectly relied upon *Palazzolo*, which was "quite unlike [*Williamson* and its progeny]." *Palazzolo*, 121 S. Ct. at 2459. In *Palazzolo*, the petitioner was the owner of a waterfront parcel, most of which was salt marsh subject to tidal flooding. In 1971, Rhode Island created an agency (Council) to protect coastal wetlands that included this wetland parcel. *See Palazzolo*, 121 S. Ct. at 2455. In 1983, Palazzolo asked permission to construct a wooden bulkhead and to fill in the entire marshland area. Council denied this request. *See id.* In 1985, Palazzolo asked permission to fill in eleven of eighteen wetland acres to build a private beach club. Council again

denied this request on the basis that no compelling public purpose would be served. *See id.* Palazzolo filed an inverse condemnation action, arguing that the wetlands regulation had taken his property without compensation. *See id.* In *Palazzolo*, the Council "left no doubt" that the wetlands "could not be filled for any ordinary land use." 121 S. Ct. at 2459.

Unlike in *Palazzolo*, the Petitioner did not obtain a final decision from the appropriate state agency. As the Fourth Circuit Court of Appeals correctly pointed out, the Petitioner failed to seek a variance or to make use of North Carolina's inverse condemnation statute. Thus, Petitioner's constitutional claims were not ripe and this Court should dismiss Petitioner's petition for a writ of *certiorari*.

II. THE DECISION BELOW IS COMPLETELY IN ACCORD WITH OTHER CIRCUIT COURT DECISIONS

As demonstrated by the previous section, the decision below in no way conflicts with any decision of this Court. The decision below also does not conflict with any decision of the circuit courts. In actuality, the decision below is clearly in accord with the decisions of numerous circuit courts. *See, e.g., Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Taylor Inv., Ltd. v. VGM Corp.*, 983 F.2d 1285, 1291-95 (3d Cir. 1993); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1988). In an attempt to persuade this Court to grant *certiorari*, the Petitioner incorrectly stated that the Sixth Circuit is not in accord

with the other circuits. In order to construct the argument, Petitioner relied on *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), stating that the ripeness test of *Williamson* does not apply to bundled claims. However, in *Nasierowski*, the plaintiff did not present a takings claim, and relied solely on his claim for procedural due process. *See Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992) (citing *Nasierowski*, 949 F.2d at 894). Thus, in *Bigelow*, the Sixth Circuit Court of Appeals explained that the *Williamson* test applies if the case "does not present a pure claim of procedural due process, but instead involves several constitutional claims." 970 F.2d at 159. Hence, the Fourth Circuit Court of Appeals was in accord with the Sixth Circuit since Petitioner's claim involves several constitutional claims.

Furthermore, the Petitioner claimed that the Fourth Circuit is not in agreement with the Tenth Circuit. The Petitioner relied on *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1988), which held that a procedural due process claim may be litigated even though the takings claim was not ripe. However, the Tenth Circuit in *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1177 (10th Cir. 1999) overruled *Landmark*. In *Rau*, the court of appeals recognized that "the Tenth Circuit [had] previously determined that due process and equal protection claims are subsumed within 'the more particularized protection of the [Takings] Clause.'" 76 F. Supp. 2d at 1177 (citing *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (quoting *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)). Thus, the Tenth Circuit Court of Appeals in *Rau* held that an "unripe takings claim renders the ancillary due process and equal protection claims unripe as well. 'A contrary

holding would render the Supreme Court's decision in *Williamson* nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation.' " 76 F. Supp. 2d at 1177 (quoting *Bateman*, 89 F.3d at 709). Hence, contrary to the Petitioner's assertions, the Fourth Circuit is, in actuality, in complete accord with the other circuits. Therefore, this Court should deny Petitioner's petition for a writ of *certiorari*.

III. THE FOURTH CIRCUIT'S *PER CURIAM* OPINION IS NOT BINDING PRECEDENT IN THE FOURTH CIRCUIT

Unpublished opinions are not binding in the Fourth Circuit. *See Mueller v. Angelone*, 181 F. 3d 557, 579 (4th Cir. 1999); *see also* Local Rule 36(c). In the case at hand, the Fourth Circuit Court of Appeal's decision is an unpublished *per curiam* opinion. Therefore, since there is no wide-spread precedential value, this Court should not grant *certiorari* in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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